Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

REPLY COMMENTS OF VERIZON

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Introduction and Summary

The current checkerboard of different rules for competing providers of broadband service disrupts the efficient working of the market and is in direct conflict with the statutory directive to "encourage deployment" of such service. The best way to reach both a rational and national broadband policy is to treat all broadband services under a single regime that is not tied to the regulatory history of the entity providing them or to the regulatory treatment of *other* services offered by that entity in the separate narrowband market. The Commission clarified in its recent

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. identified in the list attached as Exhibit E hereto.

Cable Modem Declaratory Ruling[2] that broadband Internet access provided by cable companies is an information service that uses telecommunications, and that cable companies are currently free to provide stand-alone broadband telecommunications on a private-carriage basis under Title I of the Communications Act rather than on a common-carriage basis under Title II. In this proceeding, the Commission should make the same clarification for broadband provided by local telephone companies: The Commission should reiterate that Internet access is an information service that uses telecommunications and should declare that, henceforth, local telephone companies are free to provide stand-alone broadband telecommunications on a private-carriage basis under Title I of the Communications Act.

No one seriously disputes that bundled broadband Internet access is an information service. And if Internet access is an information service, then it *cannot be* a telecommunications service, because these two categories of service are mutually exclusive.

Through its *Computer II/III* orders, the Commission performed what it has since called the "radical surgery" of finding "a telecommunications service inside every information service, extract[ing] it, and mak[ing] it a stand-alone offering to be regulated under Title II of the Act."[3] But this extra regulatory burden is not consistent with the law or with sound public policy.

The fundamental premise underlying the *Computer II/III* regime – that information service providers have no alternative to the local telephone network by which to reach their customers – has been undermined in the narrowband world, and never had any validity in the

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[2] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

[3] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, ¶ 43.

competitive realities of the broadband marketplace. As has been well documented in the related *ILEC Broadband Non-Dominance Proceeding*, CC Docket No. 01-337, local telephone companies are new entrants in broadband, bringing fresh competition to the incumbent cable companies in the mass-market segment and the incumbent long-distance companies in the larger business segment. That being the case, there is no justification either for extending the *Computer II/III* rules to broadband or for requiring that stand-alone broadband transmission be offered on a common-carrier basis under Title II. Importantly, Title I classification does not mean that either ISPs or CLECs will be unable to reach their customers over the public telephone network. Verizon fully intends to open its network to unaffiliated providers on commercially reasonable, market-based terms.

The FCC has broad authority to classify broadband under Title I, and it has done so for other, similar services under similar circumstances. Nothing in Title II of the Act limits the Commission's authority to determine the appropriate regulatory classification for broadband services. Moreover, even if Section 10 or Section 214 of the Act were applicable in these circumstances – which they are not – they would pose no obstacle to Title I classification for broadband because broadband easily meets the prerequisites to forbearance or discontinuance of service set forth in those sections.

Title II's retail regulations – especially the obligation to provide service under tariff – are unduly burdensome and counterproductive in the broadband context, where local telephone companies should be free to experiment with innovative pricing schemes, just as their cable and Internet competitors already are doing. Title II's wholesale regulations, including the obligation to offer network elements on an unbundled basis under Section 251(c)(3) and the requirement of a separate affiliate for interLATA services under Section 272, likewise skew competition and create disincentives to investment in broadband facilities and services. The requirement to provide interLATA services though a separate affiliate is even more problematic for broadband offerings than for traditional voice services. Customers desire and expect an integrated broadband network capability; dismembering integrated broadband services and requiring that they be offered through multiple affiliates not only confounds this expectation but also creates inefficiencies that raise the cost of providing broadband services. The inefficiencies associated with maintaining a separate affiliate for certain broadband services has already caused Verizon to incur a total of nearly *half a billion dollars* in incremental costs to date. These inefficiencies and the costs associated with them will continue, and may even escalate, if interLATA broadband transmission is regulated as a telecommunications service that must be provided through a separate affiliate under Section 272.

In order to ensure a truly national uniform broadband policy, the Commission should preempt state attempts to regulate broadband. The preemption should apply not only to direct regulation but also to indirect regulation, as when a state imputes revenues from broadband to other regulated services (effectively denying or severely limiting the ability of broadband providers to profit from their risky investments in new broadband services or facilities), or allocates costs from regulated services to broadband services (effectively driving up the price of broadband to the detriment of consumers and of competition). Finally, as part of its uniform national policy, the Commission should require that all providers of broadband transmission contribute to the schools and libraries portion of the universal service fund – but only to that portion of the fund, which is the only segment used to subsidize broadband deployment.

The current fractured regulatory regime for broadband, in which cable and satellite broadband providers are entirely free from Title II obligations, long distance companies providing broadband are non-dominant and thus get Title II "lite," while local telephone companies are subjected to the full burdens and costs of Title II regulation, is arbitrary and discriminatory. This asymmetric regulatory scheme violates not only the Administrative Procedure Act and the Communications Act but also the First and Fifth Amendments to the U.S. Constitution. It cannot continue. The Commission should seize this opportunity to create a truly national broadband policy under Title I of the Act that would provide a common set of rules for all broadband providers and would allow market forces to drive efficient investment and deployment.

Discussion

The Commission should regulate local telephone company broadband, including stand-alone broadband transmission, under Title I of the Communications Act, just as it has done with cable company broadband.[4] Title II applies only to telecommunications services, which is to say telecommunications offered on a common-carrier basis. The question at the core of these proceedings is whether local telephone companies – unlike the cable companies who dominate the mass-market segment, and unlike the emerging satellite and terrestrial wireless broadband providers – should be *required* to provide broadband on a common-carrier basis and thus be subject to the burdens and costs of Title II regulation. The answer is no. Most of Title II's provisions are designed to prevent the exercise of market power and therefore have no application to the broadband realm, where healthy, facilities-based competition ensures that local telephone companies lack the ability unilaterally to raise prices or reduce output.

[4] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823-24, ¶¶ 41-42, 4829-30, ¶ 54.

I. Bundled Broadband Internet Access Is Unquestionably a Title I Information Service

As Verizon noted in its opening comments, the Commission's "tentative conclusion" that wireline providers of bundled high-speed Internet access service offer an "information service" simply restates existing law.[5] The Commission has long regarded Internet access as an information service – a conclusion reconfirmed in the recent *Cable Modem Declaratory Ruling*.[6] Indeed, few commenters even bother to question this well-established regulatory classification. Instead, some commenters opposing Title I treatment of broadband provided by local telephone companies argue that Internet access provided over a company's own facilities is somehow *both* an information service and a telecommunications service.[7] The Commission should resist any temptation to blur the distinction between information services and telecommunications services by creating a new, amorphous category of "hybrid" services. All information services *by definition* use telecommunications, so the presence of telecommunications in Internet access service cannot distinguish a "hybrid" service from an ordinary information service.

Nor is there any legitimate basis for saying, as some commenters suggest, that facilities-based Internet-access providers offer a "hybrid" service, while non-facilities-based Internet-access providers offer an ordinary information service.[8] The Commission's analysis should focus, like the relevant statutory definitions, on the single, integrated information service that the

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[5] *See* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3029, ¶ 17 (2002) ("*NPRM*").

[6] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821, ¶ 36.

[7] *See* Allegiance at 12; Big Planet at 25-27; Business Telecom, Inc., *et al.* at 4-7; WorldCom, *et al.* at 6; Ohio ISP Ass'n, *et al.* at 3; Time Warner Telecom at 9.

[8] *See, e.g.*, National Rural Telecom Ass'n at 9-11.

subscriber receives. From the customer's perspective, it makes no difference whether their information services provider uses its own facilities. Moreover, the recent *Cable Modem Declaratory Ruling* forecloses the argument that facilities-based providers should be treated differently. There the Commission expressly determined that cable modem service "is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs."[9] Furthermore, "[t]he cable operator providing cable modem service over its own facilities . . . is *not offering* telecommunications service to the end user, but rather is merely *using* telecommunications to provide end users with cable modem service."[10] Cable modem operators offer Internet access using their own facilities, yet at present they need not offer broadband transmission on a stand-alone basis at all – much less on a common-carrier basis.[11]

By suggesting that local telephone company Internet access is somehow simultaneously both an information service and a telecommunications service, certain commenters appear to be confusing the regulatory status of Internet access itself with the obligations imposed on local telephone companies under the *Computer II/III* orders. It is certainly true that, today, local telephone companies do offer the transmission component of Internet access on a common-carrier basis under tariff. But that is not because Internet access necessarily involves provision of a common-carrier telecommunications service. Rather, it is because the *Computer II/III*

[9] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, ¶ 33.

[10] *Id.* at 4823-24, ¶ 41 (emphasis added).

[11] *Id.* at 4823-25, ¶¶ 41, 43; *cf. also id.* at 4839, ¶ 72 (seeking comment on "whether it is necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly").

orders oblige local telephone companies, as the Commission has said, "in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act."[12] The Commission decided that, in the case of cable broadband, "[s]uch radical surgery is not required."[13] As will be discussed below, this radical surgery is no more appropriate when local telephone companies provide information services – especially in the broadband market, where they are newcomers challenging the cable incumbents in the mass-market segment and long-distance incumbents in the larger business segment. Thus, Internet access is an information service (and only an information service), no matter who provides it. The Commission may have *created* a telecommunications service based on the transmission component of wireline Internet access through its *Computer II/III* rules, but that requirement does not alter the basic statutory classification scheme, which treats information services and telecommunications services as two mutually exclusive categories.[14]

Ignoring the Commission's statements about the necessity of "radical surgery," WorldCom asserts that the legislative history of the Act demonstrates that "Congress understood that there would always be a telecommunications service underlying [every] information

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[12] *Id.* at 4825, ¶ 43.

[13] *Id.*

[14] *See id.* at 4823-24, ¶ 41 ("In the *Universal Service Report*, the Commission concluded that the Act's 'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service: 'when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' . . . it offers an 'information service' even though it uses telecommunications to do so.'") (quoting Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11520, ¶ 39 (1998) ("*Universal Service Report*")); *see also* Order on Remand, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 FCC Rcd 9751, 9770, ¶ 36 (2001).

service."[15] That is false. WorldCom bases its claim on a Senate Report stating that "[t]he underlying transport and switching capabilities on which [information] services are based . . . are included in the definition of 'telecommunications services,'" and that the definition of telecommunications services "include[s] the transmission, without change in form or content, of [information] services."[16] WorldCom fails to mention, however, that the definition being discussed in these passages was never enacted into law. The proposed definition discussed in the Senate Report explicitly provided that "telecommunications service[s]" included "the transmission, without change in form or content, of information services and cable services."[17] The definition of "telecommunications service" actually enacted, however, *omits* this language. The legislative history relied upon by WorldCom is thus irrelevant to the Act as actually passed. Indeed, the fact that Congress explicitly considered and then *rejected* a definition of telecommunications service that explicitly included the underlying transmission for information services strongly suggests that Congress did *not* "underst[and] that there would always be a telecommunications service underlying an information service" – precisely the opposite of what WorldCom claims.[18] Indeed, even many commenters who favor maintaining the regulatory

[15] WorldCom, *et al.* at 66; *see also* Allegiance at 12.

[16] S. Rep. No. 104-23, at 18 (1995).

[17] *Id*. at 79.

[18] WorldCom, *et al.* at 66; *see INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation and internal quotation marks omitted).

status quo recognize, correctly, that Internet access is an information service that uses telecommunications.[19]

Furthermore, the Commission's stated goal of applying an analytical framework "focusing on the nature of the service provided to consumers, rather than one that focuses on the technical attributes of the underlying architecture"[20] requires that the Commission not vary its statutory analysis of bundled broadband Internet access depending upon what technology is being used to provide the access. Like services must receive like regulatory treatment. The comments of Hughes Network Systems, Inc., *et al.* ("Hughes") and Hughes's affiliate DIRECTV Broadband run afoul of this principle, however. Seeking to have wireline Internet access classified under Title II, DIRECTV insists that broadband transmission "is a necessary, distinct, and clearly common-carriage component of" bundled broadband Internet access service.[21] Yet DIRECTV's satellite affiliate, Hughes, states categorically that it "does *not provide any telecommunications service* (*i.e.*, telecommunications provided on a common carrier basis)" as part of its broadband Internet access.[22] Indeed, according to Hughes, "satellite-delivered broadband Internet access services incorporate only a 'telecommunications' input, at most."[23] Based on longstanding Commission precedent recently reaffirmed in the *Cable Modem Declaratory Ruling*, Hughes is clearly right on these points. But one thing is even clearer:

[19] *See, e.g.*, AT&T at 12; AOL Time Warner at 5-6; Catena Networks at 7; RERC-TA at 3.

[20] *NPRM*, 17 FCC Rcd at 3023, ¶ 7.

[21] DIRECTV at 20.

[22] Hughes at 2 (emphasis added).

[23] *Id.*

Hughes and DIRECTV cannot have it both ways. If broadband Internet access "necessarily" involves a telecommunications service, as DIRECTV would have it, then that necessity applies equally when one of DIRECTV's affiliates is providing the access. And if, as Hughes says, its broadband Internet access incorporates a "telecommunications" input – and *not* a telecommunications service – then the same is true of Internet access provided by local telephone companies.

To sum up, the Commission should reaffirm its long-standing conclusion that bundled broadband Internet access is an information service, regardless of the traditional business or parentage of the entity providing that service, and regardless of the technology used to provide it. And, as discussed further below, it should eliminate the requirement, which applies only to telephone companies, to separate out and offer the broadband transmission component of that service on a common-carrier basis.

II. Broadband Transmission Sold Alone Is Properly Classified as "Telecommunications," Not as a Common-Carrier "Telecommunications Service"

As just noted, the unbundling provisions of the Commission's *Computer II/III* regime require that the telecommunications component of a local telephone company's bundled information service be made available on a stand-alone basis under tariff, and hence subject to Title II. Similarly, when local telephone companies offer stand-alone broadband transmission to the larger business customers in the form of such services as ATM and Frame Relay, they do so under tariff and subject to Title II – indeed, because the Commission currently regulates them as dominant carriers even when they provide broadband, they cannot do otherwise. Yet the Commission has made it clear that Title II treatment is justified only to prevent an abuse of market power. Where competition can be counted on to restrain market power, the Commission lets market forces, rather than Title II regulations, guide the development of the marketplace.[24] The Commission has often either mandated that services or facilities be taken outside of Title II completely, or allowed telecommunications providers to choose whether to offer service on a common- or non-common-carrier basis, particularly when those services are innovative or involve emerging technologies.[25] Given the nascent state of the broadband market and the local telephone companies' utter lack of market power, the Commission should classify all broadband transmission under Title I. This would allow the Commission to write on a clean regulatory slate, without the regulatory overhang of a Title II system designed to regulate the narrowband voice market of yesteryear, not the broadband market of today and tomorrow. By eliminating in this context the counterproductive, expensive Title II regulation of local telephone companies, the Commission not only would allow those companies to negotiate flexible, mutually beneficial terms and conditions with their customers, which is impossible under Title II's stringent tariffing system, but also would create a regulatory environment conducive to the very substantial further investment needed to bring about widespread broadband deployment.

The D.C. Circuit has stated unambiguously that determining whether a given service is to be regarded as common carriage involves a two step process: First, one must inquire whether there is a legal obligation to hold oneself out as a common carrier. Only if the answer to that first question is negative does the question arise whether the carrier does in fact offer the service

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[24] *See infra* note 63 and accompanying text.

[25] *See, e.g., Computer & Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 208-09 (D.C. Cir. 1982) ("*CCIA*") (affirming the reasonableness of the Commission's determination that enhanced services and customer premises equipment ("CPE") were outside the scope of Title II); *see also Philadelphia Television Broad. Co. v. FCC,* 359 F.2d 282 (D.C. Cir. 1966).

indifferently to the public at large.[26] Remarkably, many of the commenters who oppose classifying wireline broadband under Title I ignore the first of these questions, which is the only one relevant to these proceedings. These commenters argue that stand-alone wireline broadband transmission must be classified under Title II because it is in fact offered on a common-carrier basis today.[27] But that argument is entirely beside the point because the Commission historically has *required* local telephone companies to offer their broadband transport under tariff. It would be hopelessly circular for the Commission to conclude that telephone companies should be regulated under Title II because they behave like common carriers, when the only reason they behave like common carriers is that they are currently regulated under Title II. The decisive question in these proceedings therefore is *not* whether the transport is in fact offered indifferently to the public. Instead, it is whether there is any justification for requiring that the transport continue to be so offered.

Consequently, many pages in the opening round of comments in this proceeding were wasted discussing whether current wireline broadband transmission, as currently sold, constitutes common carriage and thus falls within the definition of "telecommunications service." What matters is that, as Verizon explained in its opening comments, there is no justification for

[26] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the service's] operations to expect an indifferent holding out to the eligible user public.").

[27] *See, e.g.*, AT&T at 12-13; Earthlink at 42-43; DSLNet at 19-21; KMC Telecom/Nuvox Communications at 3-5; Business Telecom, *et al.* at 11-12; Allegiance at 18; DIRECTV at 28-29; Cbeyond, *et al.* at 26-27; Ohio ISP Ass'n, *et al.* at 15-16; California ISP Ass'n at 15; US LEC at 9-10.

requiring that local telephone companies offer broadband transport on a common-carrier basis going forward, in view of the nascent state of the broadband market, the local telephone companies' utter lack of market power in broadband, and the Commission's classification of competing services under Title I.

The Commission's treatment of local telephone company broadband under Title II until now has not been the product of a considered decision on the part of the Commission. Instead, Title II has been applied to wireline broadband reflexively, through "regulatory creep." A careful consideration of the state of competition in the broadband market and the role that local companies play there strongly supports the conclusion that Title II is the wrong regulatory pigeonhole for wireline broadband – especially since its major competitors are regulated under Title I.

A. The Commission Has Authority To Classify Stand-Alone Broadband Transmission Under Title I

The Commission has ample authority to classify stand-alone broadband transmission as private carriage under Title I. Commenters who suggest the contrary are simply mistaken, for at least three reasons. First, the Commission is the source of the *Computer II/III* unbundling rules and thus inherently has the power to decide to what circumstances, if any, those rules should apply. Second, the Commission has on many occasions authorized services to operate on a private-carriage basis under Title I and has often even given operators a choice between private carriage and common carriage. Indeed, the Commission has allowed both cable and satellite companies to operate as non-common carriers. These precedents confirm the Commission's ability to provide the relief sought here. Finally, the Commission has authority under Title I to regulate "all interstate and foreign communication by wire or radio,"[28] so long as its regulations are "reasonably ancillary" to the effective performance of its regulatory mission.[29] Section 706 of the 1996 Act makes encouraging widespread broadband deployment a key part of that regulatory mission.[30]

Reform can start with the *Computer II/III* rules, which require that the transmission component of wireline broadband Internet access be offered on a common-carrier basis under tariff. The Commission itself promulgated these rules and has revised them periodically to take into account developments in the information services marketplace.[31] The Commission has not yet formally considered, however, whether the *Computer II/III* unbundling requirement should apply to broadband Internet access. In these proceedings, the Commission has power to evaluate the broadband market and decide that question as a matter of first impression. For the transmission component of broadband Internet access, there would be no "reclassification" – there would simply be a matter of interpreting or, if necessary, modifying the Commission's own rules. Despite the fanciful claims of some commenters to the contrary,[32] the Commission's authority to decide on the applicability of its own rules is beyond question.[33]

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[28] 47 U.S.C. § 152(a).

[29] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[30] Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note).

[31] *See generally NPRM*, 17 FCC Rcd at 3036-40, ¶¶ 33-42 & sources cited therein.

[32] *See*, *e.g.*, Allegiance at 22.

[33] *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (courts must give agency's interpretation of its own rules "controlling weight") (citation and internal quotation marks omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (same); *see also* 5 U.S.C. § 551(5) (allowing agencies to "repeal" or "amend" regulations).

Even with respect to stand-alone broadband transmission that may in some cases be distinct from the transmission component of Internet access – Asynchronous Transfer Mode ("ATM") and frame relay, for instance – the Commission has authority to allow carriers to offer these services as private carriage rather than as common carriage. As the D.C. Circuit confirmed when it upheld the Commission's landmark decision to classify information services and CPE under Title I, "the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation" by classifying services as non-common carriage under Title I.[34] As noted in Verizon's opening comments, the Commission has used this discretion to allow non-common-carrier provision of satellite services,[35] submarine cables,[36] for-profit microwave systems,[37] dark fiber,[38] and various mobile services,[39] to name just a few.[40]

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[34] *CCIA*, 693 F.2d at 212.

[35] Declaratory Ruling, *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993) (allowing certain satellite services on a private carriage basis, including mobile voice, data, facsimile, and position location for both domestic and international subscribers); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (Int'l Bur. 1995) (allowing use of the Globalstar system for mobile voice, data, facsimile, and other services as a non-common carrier).

[36] Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff'd*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); Cable Landing License, *FLAG Pacific Limited*, 15 FCC Rcd 22064 (Int'l Bur. 2000).

[37] *See, e.g.*, Memorandum Opinion and Order on Reconsideration, *General Tel. Co. of the Southwest*, 3 FCC Rcd 6778 (Priv. Rad. Bur. 1988) (providing that for-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network).

[38] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

[39] Policy Statement and Order, *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991); Memorandum Opinion and Order

Ignoring these precedents, some commenters, like AT&T, imagine that the Commission's discretion to classify services under Title I is limited to an improbably narrow class of offerings that are "unique to individual customers" or for which there is "no (or little) general demand."[41] This argument seems to assume that there would be something odd or unusual about offering mass-market products on an individual contract basis. Yet Internet access is offered today on what is in effect a private carriage basis without difficulty. Cable companies likewise have separate contracts with their individual customers, and other similar examples abound.

Certainly, nothing in the Commission's precedent or the relevant court decisions indicates that the Commission's authority to allow private carriage is limited to services that face no generalized demand. Indeed, quite the contrary. In upholding the Commission's promulgation of certain cable television regulations under Title I (because Title VI had not yet been enacted), Chief Justice Burger noted that "the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development" of the subjects it is charged with regulating; that Congress understood that "scientific developments would inevitably enlarge the role and scope" of those matters; and that, "in consequence,

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on Reconsideration, *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982) (dispatch services may be offered either on a common or non-common carrier basis); Memorandum Opinion and Order, *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) (private carrier paging system may be offered either on a common or non-common carrier basis).

[40] A listing of further examples was included as Exhibit C to Verizon's opening comments in this proceeding.

[41] AT&T at 25-26.

regulatory schemes must be flexible and virtually open-ended."[42] In fact, AT&T itself has recognized in previous proceedings before the Commission that "[n]othing in the Communications Act requires the Commission to regulate under Title II the provision of all telecommunications services."[43] Only recently has AT&T reversed course and denied the Commission's broad authority to remove services from Title II when appropriate in the public interest. Although AT&T can try to ignore its own prior statements to the Commission on this topic, it cannot ignore the broad grant of authority in the Communications Act itself.

Title I itself makes clear that the Commission's authority under that Title extends to broadband. Section 2(a) of that Title gives the Commission jurisdiction over "all interstate and foreign communication by wire or radio."[44] The only restriction on the exercise of this broad Title I jurisdiction is *not*, as AT&T's most recent filing would have it, that the communication must appeal only to a tiny number of customers and find no general demand. Rather, the Commission's regulatory decisions under Title I will be upheld so long as they are "reasonably ancillary" to the effective performance of its regulatory mission.[45] In the case of broadband, the Commission faces a specific mandate in Section 706 of the 1996 Act to promote the widespread deployment of broadband. In fact, Section 706 specifically encourages the Commission to refrain from regulation when appropriate to advance that mission, by "removing barriers to

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[42] *United States v. Midwest Video Corp.*, 406 U.S. 649, 675-76 (1972) (Burger, C.J., concurring in the result).

[43] Comments of AT&T at 73, C*ompetition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132 (FCC filed July 3, 1990).

[44] 47 U.S.C. § 152(a).

[45] *Southwestern Cable Co.*, 392 U.S. at 177.

infrastructure investment and promoting competition" in broadband, and to do so "without regard to any transmission media or technology."[46] Creating a level regulatory playing field under Title I on which all broadband providers can compete equally under the same set of rules is thus not merely "reasonably ancillary" to the Commission's regulation of telecommunications, broadcasting, and cable but in fact goes to the very heart of its statutory mission. That being so, there is no doubt that the Commission has the authority to promote deployment, remove regulatory barriers to investment, and promote competition by classifying all broadband services – including stand-alone broadband transmission, regardless of who provides it – under Title I of the Act. Indeed, even some advocates of maintaining the regulatory status quo implicitly recognize that the Commission has the power to classify services under Title I so long as the provider lacks market power.[47]

B. Nothing in Title II Limits the Commission's Authority To Determine the Appropriate Regulatory Classification for Broadband

Some commenters argue that the Commission's general power to classify services under Title I is somehow limited by Section 10 of the Act, which empowers (and indeed requires) the Commission to forbear from Title II regulations under certain conditions. This argument requires a very strange understanding of the purpose of Section 10, which, after all, makes it clear that the Commission could decline to have common carriers file tariffs – a requirement at

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[46] Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 157 note); *see also id.* ("[t]he Commission … shall encourage [broadband] deployment on a reasonable and timely basis … by utilizing, in a manner consistent with the public interest … regulatory forbearance"); 47 U.S.C. § 230(b)(2) (noting policy of preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services").

[47] *See, e.g.*, EarthLink at 17-18.

the epicenter of traditional common-carrier regulation.[48] The Commission had a pre-existing, broad power to strip away all inappropriate regulations by allowing private carriage under Title I. It exercised that power most dramatically in the case of information services and CPE in *Computer II*. The D.C. Circuit has approved the FCC's use of private carriage in place of common carriage and held that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances."[49]

To this general power to classify services appropriately and allow market forces to work, Congress added further authority in Section 10 to forbear from individual statutory provisions as well, if certain conditions are met. Thus, Congress gave the Commission a finer tool with which to eliminate unnecessary or counterproductive rules for any services that it continues to classify under Title II. AT&T, WorldCom, and others, however, would perversely read Section 10 not as explicitly granting the Commission authority to forbear where services remain subject to Title II but instead as limiting the Commission's pre-existing authority to determine the appropriate regulatory classification of services – including new and innovative services such as broadband. This bizarre reading takes Section 10 completely out of its proper historical context and twists its function beyond recognition.

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[48] *See, e.g.*, Notice of Proposed Rulemaking, *2000 Biennial Regulatory Review: Policy and Rules Concerning the International, Interexchange Marketplace*, 15 FCC Rcd 20008, 20010, ¶ 2 (2000) (Commission detariffed domestic interstate interexchange carriers "pursuant to the new power to forbear in Section 10" which put an end to "prolonged litigation regarding the Commission's authority to move to a nontariffed environment for non-dominant interexchange carriers").

[49] *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (citation omitted).

Even if AT&T and its allies were correct, however, and Section 10 were the only route out of the maze of Title II regulations that are discouraging investment in and slowing deployment of broadband, that fact would not affect the outcome of these proceedings, since broadband easily fulfills the requirements for forbearance under Section 10. Indeed, the key consideration in determining whether to eliminate Title II regulations is the same, regardless of whether the Commission does so by classifying broadband under Title I directly or by forbearing from Title II provisions under Section 10. That key consideration is whether the carrier possesses market power with respect to the service that is to be the subject of forbearance. Verizon has presented its analysis of how Section 10 applies to broadband in detail in the context of the parallel *ILEC Broadband Non-Dominance Proceeding*. The main points will be repeated here for the Commission's convenience.

The present circumstances in broadband clearly meet the forbearance standards that the Commission has previously established. First, the Commission has held, in granting a petition under Section 10, that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."[50] Competition is robust in this market, and there is nothing to suggest that a local telephone company with its share of the market could charge unjust or unreasonable prices or engage in unjust or unreasonable practices.

Second, for the same reason, common-carrier regulations are not "necessary for the protection of consumers," as required by Section 10(a)(2). Instead, the opposite is true –

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[50] Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) ("*Directory Assistance Order*").

consumers are best protected by allowing the marketplace to provide them with a robust choice of services from a variety of competing providers. Enforcement of common-carrier regulations is not necessary to constrain the prices that the local telephone companies charge for broadband service. Competition provides that constraint, and it is more than adequate to protect consumers.[51] Moreover, in applying Section 10(a)(2), the Commission has noted that "the fundamental objective of the 1996 Act is to bring consumers of telecommunications services in all markets the full benefits of competition."[52] The current asymmetric regulatory regime discourages rather than stimulates investment in broadband, the exact opposite of the situation that protects consumers.

Third, in determining whether forbearance is "in the public interest" under Section 10(a)(3), the Commission must "consider several factors, including benefits to consumers and whether forbearance will promote competitive market conditions."[53] The imposition of Title II regulation on one class of competitors while leaving the rest free of regulation skews, rather than promotes, competition. In granting other petitions, the Commission has held that the public interest test of Section 10 is satisfied when forbearance would make the petitioner "a more

[51] *See, e.g.,* Second Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 91 F.C.C.2d 59, 71, ¶ 24 (1982) ("Competitive market forces, together with our power to intervene in appropriate cases, are sufficient checks on the pricing of resale services."); Order and Notice of Proposed Rulemaking, *Comsat Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended*, 13 FCC Rcd 14083, 14148, ¶ 131 (1998) ("In a competitive environment, . . . regulation is not needed to encourage competitive prices. . . . Competition, rather than rate of return regulation, provides . . . an incentive to reduce costs in order to earn greater profits. Reduced costs eventually will benefit rate payers in the form of lower rates.").

[52] *Directory Assistance Order*, 14 FCC Rcd at 16277-78, ¶ 46.

[53] *Id*. at 16278, ¶ 48.

effective competitor."[54] Regulation adds costs to local telephone company provision of broadband services, and the Commission has found that the avoidance of unnecessary cost is also in the public interest.[55] Under these circumstances, Section 10 – not to mention Section 11 (of the 1934 Act) and Section 706 (of the 1996 Act) – requires that the Commission forbear.

Additionally, Section 10(d) provides that the FCC may forbear from applying the wholesale requirements of Sections 251(c) and 271 once those provisions "have been fully implemented."[56] Whatever full implementation of these provisions may entail, it does not include any obligation to unbundle network elements used solely for broadband. In its recent decision remanding the Commission's unbundling rules for further consideration, the D.C. Circuit clarified that the Commission must consider the impact of intermodal competition when deciding whether the "impairment" standard of Section 251(d)(2) is met and must justify any decision to unbundle a given network element by reference to whether "the cost characteristics of an 'element' render it at all unsuitable for competitive supply."[57] In the broadband context, the presence of vigorous intermodal competition from multiple competing platform providers means that the standard cannot be met for broadband facilities. This is especially true of the new network facilities that local telephone companies will need to install at enormous cost to upgrade their networks. As current market conditions abundantly show, competing providers likewise can deploy their own new technologies and facilities. Verizon will discuss broadband

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[54] *Id*. at 16278-79, ¶ 49.

[55] *Id*.

[56] 47 U.S.C. § 160(d).

[57] *United States Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.*, slip op. at 21 (D.C. Cir. May 24, 2002) ("*USTA*").

unbundling and the impact of the D.C. Circuit's decision in its reply comments in the *UNE Triennial Review Proceeding.*

Even if some unbundling obligation arguably did apply to broadband facilities, however, Section 10 nevertheless allows the Commission to forbear from any unbundling requirements where they have been fully implemented – and the unbundling requirements must have been fully implemented in, for example, any state where the Bell company has demonstrated that it meets the competitive checklist in Section 271 of the Act.

Furthermore, the Commission itself has tentatively concluded that, to the extent that it applies at all, forbearance from all Title II regulation of cable modem service would be appropriate under Section 10. The Commission explained that "forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[58] These same considerations apply equally to local telephone company broadband – indeed, more so, because local telephone companies serve a much smaller share of the broadband mass-market segment than cable companies. Therefore, even if it were relevant – which it is not – Section 10 would pose no obstacle to the regulation of broadband transmission under Title I.[59]

Commenters suggesting that Section 214 of the Act poses an obstacle to Title I treatment of broadband are equally mistaken, for substantially the same reasons. Section 214, which prohibits the withdrawal of common carrier services absent a finding that the withdrawal would

[58] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

[59] *Id*.

not adversely affect the public interest, convenience, and necessity, is simply not implicated by a decision on the part of the Commission to allow the offering of a given service on a private carriage basis.[60] Section 214 sets conditions on the discontinuance of a Title II service, so in order for Section 214 to apply, there must be a discontinuance and there must be a Title II service. If the Commission decides that broadband is to be regulated under Title I, however, then the services will continue, but on a private carriage basis. Hence, there will be neither a Title II service nor a discontinuance, and Section 214 will not apply. But even if Section 214 were implicated, it would pose but a small hurdle, easy to overcome. In the presence of robust, facilities-based competition, reliance on market forces to set the terms and conditions of service is in the public interest, while heavy-handed, asymmetric common-carrier regulation would actually harm competition and consumers. For confirmation of this principle, one need look no further than the Commission's own *Computer II* decision, which stated that it would disserve the public interest to subject enhanced services to traditional common carriage regulation not only because the enhanced services market was rapidly evolving and sufficiently competitive,[61] but also because "the very presence of Title II requirements inhibits a truly competitive, consumer responsive market."[62]

[60] Incidentally, the citation by some commenters of the maxim that a carrier cannot "vitiate its common carrier status merely by entering into private contractual relationships with its customers" is completely beside the point. This proceeding is about whether the *Commission* should allow telephone companies to offer broadband on a non-common-carrier basis. What those companies may or may not be able to do unilaterally is not in issue. *Cf.* AT&T at 29; ASCENT at 12 (both quoting *Southwestern Bell Tel. Co.*, 19 F.3d at 1481).

[61] *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 F.C.C.2d 384, 428, ¶ 113, 433, ¶ 128 (1980).

[62] *Id.* at 426, ¶ 109.

For all these reasons, the Commission has the requisite authority to classify broadband services – including stand-alone broadband transmission – under Title I. And because local telephone companies lack market power in broadband, it should do just that.

III. Local Telephone Companies Lack Market Power in Broadband

As noted in Verizon's opening comments, the Commission has ruled that "public interest requires common carrier operation" of facilities only where the incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier."[63] Verizon has documented the state of competition and the competitive dynamics in the broadband market in considerable detail in the *ILEC Broadband Non-Dominance Proceeding*, and it incorporates its comments in that proceeding by reference as if fully set forth herein.[64] A summary of the analysis supporting the conclusion that local telephone companies lack market power in broadband, both in the mass-market segment and in the larger business segment, appeared in Verizon's opening comments in the current proceeding,[65] and the factual basis for the analysis

[63] *AT&T Submarine Systems, Inc.*, 13 FCC Rcd at 21589, ¶ 9; *see also, e.g.*, Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power"); *see generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

[64] Comments and Reply Comments of Verizon, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002 and April 22, 2002 respectively) ("Verizon Broadband Non-Dominance Comments" and "Verizon Broadband Non-Dominance Reply Comments").

[65] Verizon at 15-16.

was summarized in the Broadband Fact Report attached as Exhibit A to those comments. For the Commission's convenience, two declarations by noted economist Dennis Carlton and his colleagues, which were originally included in the *ILEC Broadband Non-Dominance Proceeding*, are attached hereto as Exhibits A and B. These declarations further support the conclusion that local telephone companies lack market power in broadband.

In brief terms, the local telephone companies lack market power because they face facilities-based competition. In the larger business segment, vigorous, well-funded competitors; massive recent investments sunk into fiber and packet switches; and large, sophisticated clients with long-term contracts prevent any exercise of market power by the local telephone companies, who have small market shares.[66] Increased facilities-based competition for business customers has come even from electric utilities.[67] In the mass-market segment, equally vigorous and well-funded competitors reach their customers over multiple competing platforms,[68] and the Commission itself recently "recognize[d] that residential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and

[66] Verizon Broadband Non-Dominance Comments at 19-22; Verizon Broadband Non-Dominance Reply Comments at 26-30.

[67] *See, e.g.*, Tiffany Kary, *In New York, Ethernet Goes Electric*, CNET News.com, May 30, 2002 (noting that businesses in New York City can now get broadband services "through the city's electrical conduits" because the local power company has begun offering high-speed data services using its own fiber network).

[68] Verizon Broadband Non-Dominance Comments at 17-19; Verizon Broadband Non-Dominance Reply Comments at 14-15.

satellite."[69] The Commission has already recognized that local telephone companies control no "bottleneck" facility because there are multiple routes spanning the "last mile" to the customer.[70]

Most of the commenters who claim that local telephone companies have market power ignore the fact that wireline broadband accounts for less than a third of the mass market, while cable companies account for more than two thirds.[71] Indeed, the local telephone companies represent the most vigorous source of competition to the entrenched cable companies who would otherwise dominate the market to an even greater extent than they do now. There is no separate market for DSL. Even AT&T's economist Robert Willig admits that it is "beyond dispute" that cable modem service is in the same relevant market as DSL.[72] So even ignoring satellite and

[69] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, ¶ 6.

[70] *See, e.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11865, ¶ 19 (2000) ("The record before us, which shows a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless, suggests that no group of firms or technology will likely be able to dominate the provision of broadband services."); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9866, ¶ 116 (2000) (finding that cable operators, despite having a commanding share of the residential broadband market, face "significant actual and potential competition from . . . alternative broadband providers"); Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, 14 FCC Rcd 2398, 2423-24, ¶ 48 (1999) ("preconditions for monopoly appear absent" in the broadband access market, and "there are, or likely will soon be, a large number of actual participants and potential entrants").

[71] *Broadband Fact Report* at 2, 13.

[72] Willig Broadband Non-Dominance Decl. ¶ 135 (Attachment A to Comments of AT&T Corp., *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (FCC filed Mar. 1, 2002) ("AT&T Broadband Non-Dominance Comments")); *see also id.* ¶ 30 (noting that cable and DSL "compete head-to-head"); Willig

wireless alternatives, local telephone companies would have, at most, only about 30 percent of that market. They would have no realistic prospect of "leverag[ing]" that minority share into any kind of control over Internet access or any other information service, as some commenters claim.[73] It is particularly outrageous to hear AT&T – the nation's largest cable operator – and DIRECTV – the nation's largest DBS operator – describe telephone companies as having a bottleneck, when they themselves have their own alternative facilities for reaching customers.[74] Certainly, these companies and their affiliates have not found the local telephone network to be a "bottleneck" through which they must pass to reach their customers. Furthermore, it is hypocritical in the extreme for AT&T now to claim that ISPs "today rarely have alternative broadband suppliers and would be at the mercy of their Bell competitors,"[75] when AT&T has fought tooth and nail for years to keep its own cable pipes closed to ISPs on the ground that open access would stifle investment and deployment.

AT&T has argued, for example, that in order to compete with incumbent LECs, "cable providers will be required to invest billions of dollars to upgrade their networks – an economic and technological risk that cable companies will not undertake if they would then have to provide unbundled access to those upgraded facilities to third parties whose business plans did not include the development and deployment of advanced infrastructure at regulated and potentially noncompensatory rates" and that "[f]orcing AT&T and TCI to accept common carrier

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Title I Decl. ¶ 43 (defining residential Internet market to include cable modem service and DSL) (Attachment A to AT&T Comments).

[73] *See, e.g.*, US LEC at 5.

[74] *See* AT&T at 40-41; DIRECTV at 7-8, 12-13.

[75] AT&T at 3.

regulation for their broadband plant from day one will create a substantial disincentive to their making the network investments that will enable facilities-based competitive local telephone service as well as advanced cable and other services to residential customers."[76] Just a few weeks ago, AT&T submitted comments in the cable modem docket saying that "government intervention . . .could only discourage and delay the widespread deployment" of broadband access alternatives.[77] Having long acknowledged that inappropriate application of common-carrier regulations create serious disincentives to investment, AT&T cannot plausibly deny now that such disincentives are real and problematic. Nor, as the owner of the nation's largest cable network, can AT&T plausibly deny that intermodal competition prevents the local telephone companies from controlling any bottleneck facilities in the broadband market.

[76] AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions To Deny or To Impose Conditions at 50-51, *Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (FCC filed Nov. 13, 1998).

[77] Comments of AT&T Corp. at 6, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185 (FCC filed June 17, 2002) ("AT&T Cable Broadband Comments"); *see also, e.g.*, Comments of Comcast Corp. at 4, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185 (FCC filed June 17, 2002) ("regulatory intervention in this area would create market uncertainty, chill the climate for investment, and undermine the rapid and timely deployment of advanced services to all Americans"); Comments of Cox Communications, Inc. at 4, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52 (FCC filed June 17, 2002) (government intervention would "impose prohibitive costs and discourage capital investment").

Yet, despite this robust and growing intermodal competition, some commenters doggedly focus on the local telephone companies' extensive local loops.[78] They decry the supposedly ruinous consequences that would follow if they could not get access to those loops. Yet, under Verizon's proposals in this proceeding, the Commission's decision regarding the proper regulatory classification for wireline broadband will have no direct impact on the degree to which competitors have access to loops or ISPs have access to a platform to reach their customers. As an initial matter, ordinary loops will continue to be available to competing carriers on an unbundled basis under any circumstances where the Commission determines that, without access to those unbundled loops, they would be "impaired" in their provision of telecommunications services within the meaning of Section 251(d)(2). Moreover, although ISPs are ineligible to obtain loops on an unbundled basis in part because they provide only information services, Verizon has made clear that they, too, can continue to reach their customers over Verizon's network on commercially reasonable, market-based terms and conditions. In fact, Verizon recently arrived at an agreement with the United States Internet Industry Association – an organization representing nearly 300 Internet providers – in which Verizon commits to negotiate commercial agreements with ISPs in a deregulated broadband market. That agreement is attached hereto as Exhibit C. Hence, there is no reason to doubt that competition among ISPs will continue to flourish, regardless of whether the Commission regulates broadband transmission under Title I or under Title II. EarthLink states that "[a]s long as IPSs have the ability to obtain broadband transmission service as an input to provide

[78] *See, e.g.*, AT&T at 30-35; DIRECTV at 9-10, 12; WorldCom, *et al.* at 74; DSLNet at 21; General Communication at 4; Business Telecom, *et al.* at 15-16; KMC Telecom/Nuvox Communications at 27-28; Allegiance at 22.

innovative services, they will strive to find and market those services."[79] Verizon has made clear that ISPs will continue to have access to the transmission they desire.

Verizon's interest in maintaining an open network is based on sound business principles. Commenters who suggest that local telephone companies lack the incentive to make transmission available to unaffiliated ISPs at commercially reasonable rates are mistaken.[80] Verizon will incur huge fixed costs updating its network, and the more traffic there is on the network, the easier it is to recover those costs – provided that Verizon is permitted to negotiate commercially reasonable, market-based rates with others who use the network. The recent decisions of AOL/Time Warner, AT&T, and Comcast to open their networks to unaffiliated ISPs on a private carriage basis provides further evidence of the potential value of this wholesale-type business model.[81]

Nor is there any reason to doubt the efficacy of intermodal competition in constraining prices for broadband transmission. EarthLink's own president, Michael McQuary, recently confirmed that competing technologies would drive down high-speed transport prices for ISPs.[82] Referring to competition between cable operators and telephone companies, McQuary said,

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[79] EarthLink at 27.

[80] *Id.* at 23; AT&T at 24; WorldCom, *et al.* at 38; Big Planet at 62-63; DSLNet at 32; Sprint at 3.

[81] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4815-16, ¶ 26.

[82] *EarthLink Prices May Drop: Technology Rivalries A Factor*, Investor's Business Daily, Apr. 16, 2002, at A8 (reporting on presentation by EarthLink President Michael McQuary to SunTrust Robinson Humphrey investment conference).

"These competing forces would ultimately bring down the price to us both on the wholesale level and to consumers."[83] And that reliance on market forces is precisely the right answer.

IV. Both Strong Policy Considerations and Governing Federal Law Oblige the Commission To Regulate Broadband Transmission Under Title I

A. The Current Asymmetric Regulatory Regime Discourages Investment and Skews Competition

In its opening comments, Verizon documented in some detail the negative impact that the current regulatory regime has had on incentives for broadband investment and deployment.[84] To recap briefly, on the wholesale side, unbundling and other Title II wholesale obligations raise telephone company costs and magnify the already substantial risk of investing in broadband technologies and services, in part due to the TELRIC methodology, which keeps prices artificially low. As the D.C. Circuit recently noted when remanding the Commission's unbundling rules for further consideration, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[85]

On the retail side of the business, Title II tariffing and rate regulations not only are inefficient and costly to comply with but also prevent local telephone companies from experimenting with innovative pricing schemes of the type that cable companies and Internet companies are already using – for example, rates based on a percentage of the customer's revenue generated using the service. By limiting the ability of local telephone companies to

[83] *Id.* (internal quotation marks omitted).

[84] Verizon at 2-3, 5-6, 18-22, 35.

[85] *USTA*, slip. op. at 20.

compete effectively, these regulations further increase the riskiness of investments in broadband facilities and services.

Furthermore, it is wrong to saddle local telephone companies with Title II regulation when their competitors have no corresponding regulatory burden to bear. The Department of Justice has recognized that "[a]pplying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals."[86]

Other commenters attempt to downplay the regulatory disincentives to investment, but their arguments lack merit. As the D.C. Circuit recently observed, "[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."[87] And, as the chairman of AT&T, the chief proponent of requiring local telephone companies to unbundle their broadband facilities, has put it, "[n]o company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[88]

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[86] Reply Comments of the U.S. Department of Justice at 26 n.42, *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132 (FCC filed Sept. 28, 1990).

[87] *USTA*, slip. op. at 16.

[88] C. Michael Armstrong, Chairman and CEO, AT&T, *Telecom and Cable TV: Shared Prospects for the Communications Future*, Remarks Before the Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998) (attached to *Ex Parte* Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-178 (Nov. 4, 1998)).

While some parties argue that the reason that broadband has not been deployed more broadly is a demand issue, rather than a supply issue,[89] that argument is ultimately a red herring. Even if there were a demand constraint in the market, relief from burdensome Title II regulations would be appropriate. Allowing local telephone companies the freedom to respond to market forces will not only speed up deployment of broadband facilities but also facilitate the development of new services to meet customers' needs. Furthermore, although DSL is a useful technology with which local telephone companies can enter the broadband market, it is not an end-state technology. Increasing the deployment of fiber throughout the local network is needed to increase the availability of broadband and to enable future services that can scarcely be imagined today. And increasing fiber deployment will require billions of additional investment dollars. Title II regulation of broadband creates a disincentive to this undeniably important investment. As Chairman Powell has correctly noted, "at this stage in the development, any broadband regulatory environment must serve to promote *investment* and *innovation*. Substantial risk investment is needed to either upgrade legacy networks or to develop new networks to support broadband capabilities and applications."[90]

The fact that considerable broadband deployment has taken place despite the fact that local telephone companies have been subject to Title II regulation does not mean that regulatory relief is unnecessary, as some commenters suggest.[91] Although the broadband markets are

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[89] *See, e.g.,* AT&T at 70; WorldCom, *et al.* at 30; Covad at 7-8.

[90] Michael K. Powell, Chairman, FCC, Remarks at the Broadband Technology Summit, U.S. Chamber of Commerce, Washington, D.C. (Apr. 30, 2002).

[91] *See*, *e.g.*, AT&T at 68-70; EarthLink at 20-21; WorldCom, *et al.* at 39-42.

robustly competitive now, there is a risk that they could become less so if the asymmetric regulatory regime is allowed to continue, thus permitting the incumbent cable companies and long-distance companies to entrench their already commanding leads in the broadband business. The point of uniform Title I regulation is to avoid locking in the market distortions that asymmetric Title II regulation has caused so far. Furthermore, although the local telephone companies' record of broadband deployment is impressive, much remains to be done. Mammoth additional investments will be needed to add fiber to the network to extend the addressability of DSL and, ultimately, to replace DSL with fiber-based technologies. Local telephone companies can make the needed upgrades to their networks, but the Title II regulatory straightjacket in which they find themselves makes it much less attractive for them to do so. Others can also build fiber networks, and some have already begun doing so. But a regulatory regime that encourages everyone to deploy broadband except local telephone companies, with their vast experience and know-how, is not merely discriminatory, but senseless.

Many of the very same commenters who point out that local telephone companies have invested hugely in broadband despite Title II regulation then turn around and argue, inconsistently, that traditional local telephone companies have a disincentive to deploy broadband in order to protect their narrowband second-line business.[92] Yet the very large investments that local telephone companies have made belie any suggestion that local telephone companies are unwilling to invest in broadband. AT&T provided a more detailed version of its argument that local telephone companies will not invest in broadband so as to protect

[92] *See, e.g.*, AT&T at 67; Big Planet at 21-23; Catena at 9; DSLNet at 11-12.

narrowband revenues in the *ILEC Broadband Non-Dominance Proceeding*,[93] and, as Verizon explained in that proceeding, AT&T's reasoning is flawed because it fails to account for the fact that approximately two out of three new mass-market broadband subscribers sign up for cable modem service, not DSL.[94] AT&T supposes that local telephone companies would stop losing second lines if they stopped selling DSL, but in reality, stopping sales of DSL would have no effect on the two thirds of lines that are lost to cable modem or wireless broadband. Nor is it likely that local telephone companies could retain the second lines of that one-third of customers who upgrade to DSL today, if they stopped offering DSL. Instead, those customers would be more likely to migrate to cable, satellite, or wireless broadband alternatives than to retain their second narrowband lines.[95] Hence, AT&T dramatically misrepresents (or, perhaps, misapprehends) the local telephone companies' incentives to delay broadband roll-out. Indeed, the advent of streaming video means that broadband poses a much greater threat to cable's core video business than to the local telephone companies' business. The cable companies' limits on the amount of streaming video that can be accessed over cable modem service or that cable networks can make available over the Internet confirm the seriousness of this threat.[96]

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[93] AT&T Broadband Non-Dominance Comments at 16-19, 37-40; Willig Broadband Non-Dominance Decl. ¶¶ 14-15, 32-33.

[94] Verizon Broadband Non-Dominance Comments at 13-14; *Broadband Fact Report* at 12-14 & Figures 1 & 2; Verizon Broadband Non-Dominance Reply Comments at 24-26; Carlton/Sider/Bamberger Reply Decl. ¶¶ 25-28.

[95] Carlton/Sider/Bamberger Reply Decl. ¶¶ 3-5.

[96] *See, e.g.,* Kurt Kleiner, *The Enemies of Innovation*, Nat'l J., Apr. 30, 2002 (noting that some cable companies "limit the amount of streaming video customers can watch (in theory because of bandwidth considerations, but perhaps also because streaming video could be a direct threat to their TV business"), *at* http://www.theatlantic.com/politics/nj/books2002-04-30.htm;

In brief, for the broadband market as a whole, the incentives to invest would be greater, the likely rate of deployment would be faster, and the level of competition would be higher if the Commission would craft a regulatory regime for broadband services under Title I that allows the market to drive efficient investment regardless of what kind of company provides the services.

Contrary to the scaremongering of some commenters, for example, classification of wireline broadband under Title I would not adversely affect competition in the voice services.[97] The basic argument against Title I treatment here seems to be that, by moving from circuit-switched voice service to packet-switched Voice over Internet Protocol ("VoIP"), and perhaps then bundling that service with Internet access or other data services – particularly after fiber to the home becomes more common – the local telephone companies could somehow sneak their services out of Title II altogether. As an initial matter, VoIP is a still-emerging technology that is still in its formative stage. Concerns about what the Commission should do if a large-scale migration of voice traffic to VoIP were to begin should not control the outcome of the Commission's decision on how to treat broadband generally. If the Commission at some point decides it needs to address VoIP, it can do so directly.

Moreover, even taking the commenters' claims at face value, they do not really involve sneaking anything out of Title II; instead, they involve offering customers additional choices of

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Sally Beatty & Leslie Cauley, *ESPN Pulls Channel From Cable System in Dispute Over Streaming-Video Limits*, Wall St. J., May 30, 2001, at B7 (reporting that ESPN withdrew its fledgling ESPNews channel from cable systems owned by Charter Communications Inc. due to a dispute centering on Charter's wish to limit the number of hours that ESPNews stream its sports-related video-content over the Internet); Steve Donohue, *MSNBC.com Breaks Ranks on Streaming*, Multichannel News, Oct. 15, 2001, at 10 (confirming that cable companies are "placing limits on the amount of content networks can stream on the Web").

[97] AT&T at 42-47; WorldCom at 24-32; Earthlink at 16-18.

new services and bundles. Local telephone companies offer circuit-switched voice service over their existing plant under tariff all over the country and will continue to do so for some time to come. The existence of these regulated services would serve to constrain the terms and conditions under which any Title I VoIP service could succeed, as would the robust competition in the broadband markets. As has now been said several times, the whole premise underlying Title II regulation of traditional voice service is that local telephone companies have market power in those services, chiefly due to their control over the local loop. But if voice is provided over IP, then all broadband competitors are equally well positioned to supply it through their various technologies and facilities, leaving local telephone companies as small fish in the VoIP pond. In fact, cable companies are already experimenting with bundled VoIP and data services offered outside of Title II.[98] These services are priced competitively,[99] and consumers can only benefit from the availability of additional choices for voice service. Furthermore, analysts expect other non-telephone company providers to enter the VoIP market, especially for larger

[98] *See, e.g.*, Amey Stone, *Redialing Internet Telephony*, BusinessWeek Online (May 1, 2002), *at* http://www.businessweek.com/technology/content/may2002/tc2002051_3643.htm (cable companies are "experimenting with voice-over-IP services"); Keith Kennebeck *et al.*, Strategis Group, *U.S. IP Cable Telephony: Operator, Are You There?* at 45 (Aug. 2001) (Adelphia, Charter, Comcast, and Time Warner are currently testing IP-based cable telephony services in numerous markets); NCTA, *Cable Telephony: Offering Consumers Competitive Choice* 5 (July 2001) ("Virtually every major cable company is planning to test, or is currently testing, VoIP.").

[99] *See, e.g.*, Kennebeck *et al.*, *supra* note 99, at 49 ("The Strategis Group estimates that cable operators are offering (or in the case of VoIP, will be offering) lifeline local and long distance voice services at a 10% discount to the ILEC's and traditional IXC's prices.").

business customers.[100] All these competitors can offer VoIP on an essentially unregulated basis, and local telephone companies should be treated no differently.

B. Federal Law Requires the Commission To Treat Local Telephone Company Broadband As It Treats Cable Company Broadband

Those who oppose classifying all local telephone company broadband under Title I must confront the fact that the Commission has *already* classified cable company broadband under Title I.[101] There is no principled basis on which to distinguish local telephone company broadband from cable broadband in this regard. As discussed in Verizon's opening comments, differential regulation of wireline and cable broadband would violate numerous provisions of federal law.

First, Section 706 of the 1996 Act itself requires the Commission to afford the same regulatory treatment to broadband services regardless of the technology used to provide those services. Section 706 mandates that the Commission regulate broadband "without regard to any transmission media or technology."[102] To apply a different regulatory classification to broadband transmission based on the technology used, or to remove barriers to investment for some technologies but not for others, would flatly contradict this mandate. In addition, the Act's definition of a telecommunications service, which has been linked by the Commission and the courts to common carrier regulation, makes clear that a service is included – or excluded – as a

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[100] Merrill Lynch, *What's Up With Telecoms? Substitution Effects Take Their Toll; Are Valuations Low Enough?* 3 (May 21, 2002) ("[N]ew competitors may also emerge in the enterprise space with names such as IBM, HPQ, or EDS. Such new entrants can add packetized voice to their growing data services. . . .").

[101] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4847-48, ¶ 95.

[102] 47 U.S.C. § 157 note.

telecommunications service "regardless of the facilities used."[103] Thus, if cable modem service is not a telecommunications service, then competing services that use different facilities cannot be either.

Second, serious First Amendment concerns are raised by the one-sided burdens and restrictions that the present regulatory regime places on the deployment and use of local telephone companies' broadband services and facilities. Broadband transmission services are one medium through which telephone companies, like their cable and satellite competitors, deliver broadband content services to their customers. Broadband, in other words, is the microphone through which telephone companies speak, and regulations that inhibit deployment or use of broadband necessarily impinge on their ability to speak. Accordingly, if the Commission were to regulate cable operators under Title I while maintaining common-carrier regulation of local telephone companies, both the Commission's reason for continued regulation *and* its reason for distinguishing between cable operators and local telephone companies would be subject to "intermediate scrutiny."[104] A decision by the Commission maintaining Title II obligations on local telephone companies could not pass this exacting standard.[105]

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[103] *Id.* § 153(46).

[104] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (applying intermediate scrutiny to FCC's cable must-carry regulations and warning that "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media") (citations omitted); *BellSouth Corp. v. FCC*, 144 F.3d 58, 68 (D.C. Cir. 1998) (applying intermediate scrutiny to restrictions on speech that apply exclusively to RBOCs), *cert denied*, 526 U.S. 1086 (1999); *cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (both holding that selective taxation of the press warranted heightened, even strict, scrutiny). Under intermediate scrutiny, a regulation will withstand judicial review only "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more

Third, the APA and the equal protection component of the Fifth Amendment's Due Process Clause prohibit the Commission from "improperly discriminat[ing] between similarly situated . . . services without a rational basis."[106] Cable modem and DSL services are functionally indistinguishable, and cable modem operators control nearly 70% of the mass-market segment.[107] The Commission therefore cannot rationally conclude that local telephone companies pose a greater risk to competition in broadband than cable operators. Recently, the D.C. Circuit found that the Commission had no rational basis for retaining certain ownership regulations based on an expressed interest in curbing the undue market power of broadcasters when the record contained insufficient evidence of such undue market power.[108] For the Commission to retain common-carrier regulations for local telephone companies in their provision of broadband would, given their lack of market power, likewise lack any rational basis. Because the Commission has elected to regulate cable operators under Title I, the APA and the Due Process Clause require that it treat local telephone companies' broadband transmission and facilities under Title I as well.[109]

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speech than necessary to further those interests." *BellSouth Corp.*, 144 F.3d at 69-70 (citation and internal quotation marks omitted).

[105] Verizon at 28-29.

[106] *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997).

[107] *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4803, ¶ 9 ("approximately 68% of residential broadband subscribers today use cable modem service") (footnote omitted).

[108] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

[109] Verizon at 24-25.

For all these reasons, because the Commission has chosen to regulate cable companies under Title I in their provision of broadband, the Commission must likewise regulate local telephone companies under Title I in their provision of broadband. Commenters' arguments to the contrary lack merit.

Some commenters argue that there is some kind of rough equality between the Title II regulation that local telephone companies face and the state and local franchise regulation that cable companies face, so that shackling local telephone companies with Title II should not be viewed as discriminatory.[110] This argument is wrong on a number of counts. First, the state franchising regulations apply only to cable's core video business; the broadband regulations either have been or soon ought to be preempted by federal law.[111] Second, the Commission has an obligation under federal law to apply its regulations rationally and evenhandedly – and it ought to treat these providers alike as a matter of policy so as not to distort competition and investment decisions. Third, cable companies face nothing like the strictures of Title II regulation faced by local telephone companies. Unlike local telephone companies, cable companies are allowed to cross-subsidize their broadband offerings with regulated video revenues. And there is plenty of revenue to go around because cable rates have been rising faster than inflation for years.[112] Finally, if state regulation were even relevant to the question of

[110] *See, e.g.*, Covad at 59-62; AT&T at 73-74.

[111] *See, e.g.*, *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 365 (4th Cir. 2001) (preempting local imposition of open-access requirements on cable modem service).

[112] *See, e.g.*, Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, FCC 01-389, ¶ 9 (rel. Jan. 14, 2002).

federal regulatory parity, one might point out that local telephone companies face state regulation that is far more onerous than that faced by cable companies. Indeed, the core regulation of telephone companies at both the federal and state level is far more burdensome than the core regulation of cable companies. For example, telephone companies are subject to full rate regulation, while most such regulation for cable is preempted. Also, unlike telephone companies, cable companies are not subject to any substantial financial reporting requirements, nor do they have any real wholesale obligations.

Indeed, even if it were true, as the California PUC suggests,[113] that a market-based approach to regulating cable modem service had been disappointing, so that further regulation of cable company broadband were needed, that would provide no excuse for discriminating against local telephone companies by keeping their broadband offerings in Title II. On the contrary, the appropriate policy response would be to provide incentives for additional competition to cable companies – an object that can be accomplished in part by removing the asymmetric Title II regulations on local telephone companies that raise their costs and prevent them from being more effective competitors to cable companies in the provision of broadband. Whatever regulatory scheme the Commission ultimately adopts must be the same for all broadband providers. As discussed below, classifying all broadband under Title I would make it easier for the Commission to ensure like regulatory treatment of like services.

[113] California PUC at 41.

V. Elements of a Proposed Uniform National Policy for Broadband Under Title I

A. Title I Provides a Clean Regulatory Slate

The main benefit of classifying broadband transmission under Title I would be to make it easier to ensure that all broadband providers are treated alike by subjecting them all to the same set of rules. In the absence of an obligation under Title II or *Computer II/III* to offer common-carrier services, broadband providers would be free to offer stand-alone transmission on a private carriage basis and to tailor their terms and conditions of service to the needs and desires of their customers. They would be free from the obligation to file tariffs and could craft new pricing mechanisms based on customer revenue, "eyeballs" delivered, or other market-based factors. On the wholesale side of the business, they would be free from the obligation to unbundle broadband-specific facilities, although (as noted above) loops would still be generally available.[114]

With respect to the consumer protection provisions of Title II, local telephone companies would of course continue to be bound by them to the extent that they offer telecommunications services.[115] Therefore, the protection they offer will remain largely unaffected because local telephone companies will continue to provide voice or other telecommunications services to most of their customers. To the extent that the Commission finds that consumer protection provisions applicable directly to broadband are needed in the public interest, however, it can

[114] *See, e.g.*, Verizon at 32-34; SBC at 32; ICC at 26; Michigan PSC at 3; *cf.* Alcatel at 8-10 (Commission should exempt broadband facilities from unbundling obligations).

[115] *See generally, e.g.*, Order on Reconsideration and Petition for Forbearance, *Implementation of the Telecommunications Act of 1996 Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409 (1999); 47 CFR §§ 64.2400 *et seq.* (truth-in-billing requirements).

impose them equally on all broadband providers under Title I. Rules ensuring access for handicapped persons to broadband facilities might fall into this category, for instance.

To take another example, the Secretary of Defense, in his capacity as Executive Agent of the National Communications System ("NCS"), has expressed concern that Title I classification of broadband Internet access might adversely affect the ability of the NCS to establish a program requiring priority broadband Internet access service in connection with national security and emergency preparedness.[116] If the Commission agrees with the Secretary that particular provisions are needed to promote national security and emergency preparedness, implementing such provisions under Title I for all broadband platforms clearly would do more to advance those goals than would retaining Title II regulation only for the local telephone companies who are minority players in the broadband market.[117]

Some commenters claim that once the Commission started down the path of imposing regulations under Title I, it would have to re-enact essentially all of the existing regulatory scheme for wireline broadband. But that is clearly not the case. At the very least, the pricing and tariffing requirements; the unbundling obligations both under Section 251(c) and under *Computer II/III*; the burdensome reporting and accounting requirements of *Computer II/III*; and the separate affiliate requirement of Section 272 should all go, in order to allow market forces to drive efficient investment and competitive outcomes for consumers.

[116] National Communications System at 2-3.

[117] *Cf. id.* at 6 (noting that Commission has jurisdiction necessary to implement the Secretary's requested measures under Title I).

B. Facilities Unbundling Discourages Investment and Is Not Required Under Title I

As discussed above, the facilities unbundling requirements of Section 251(c)(3) increase the risks and decrease the rewards of broadband investment.[118] Accordingly, this unbundling regime discourages overall investment in broadband and thwarts the attainment of widespread broadband deployment. Thus, there are sound policy reasons – as well as legal reasons discussed in Verizon's opening comments – why local telephone companies should not be required to provide broadband facilities on an unbundled basis regardless of whether broadband services are classified under Title I or Title II.[119] The recent decision of the D.C. Circuit remanding the Commission's unbundling rules emphasized that intermodal competition counts; that here there are multiple, competing facilities-based platforms; and that that the obligation to unbundle a given network element must turn on some consideration of "whether the cost characteristics of an 'element' render it at all unsuitable for competitive supply."[120] The Court also noted that the "Commission's own findings . . . repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market."[121] The Commission "'cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network,'"[122] and the acknowledged presence of multiple, facilities-based broadband competitors fatally undermines the idea that competitors would be "impaired" by the lack of access to local telephone company

[118] *See supra* Part IV.A.

[119] Verizon at 30-34.

[120] *USTA*, slip. op. at 21.

[121] *Id.* at 22.

[122] *Id.* at 24 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999)).

facilities at rock-bottom TELRIC prices. Verizon's arguments on this topic will be presented in more detail in the parallel *UNE Triennial Review Proceeding*. In the present proceeding, the presence of facilities-based competitors and the resulting lack of "impairment" provide strong grounds for classifying broadband under Title I.

Some commenters suggest, erroneously, that even if the Commission were to classify broadband under Title I, competitive carriers could nevertheless obtain access to unbundled network elements used exclusively for broadband so long as they use the facility to provide a telecommunications service and can demonstrate that they would be "impaired" absent access to the local telephone company's facilities.[123] As just noted, the D.C. Circuit's recent opinion makes it clear that competing carriers will have to address the full market picture, and not just an arbitrary subset of the market, to demonstrate impairment. Given the scope of competition in the broadband market, in fact, such carriers are not impaired. More fundamentally, however, there is no need for an "impairment" analysis if broadband is classified under Title I. This is because the Section 251(c)(3) unbundling obligation applies only to "network elements."[124] Only when the incumbent carrier uses the facility to provide a telecommunications service can the facility (and its associated features, functions, and capabilities) be a "network element," as that term is defined in the Act. Hence, although a competitive carrier's use of a facility to provide a telecommunications service is a *necessary* condition for obtaining access to the facility, it is not a *sufficient* condition. The Act defines the term "network element" as "a facility or equipment

[123] *See, e.g.*, AT&T at 29; Covad at 78-84; Qwest at 11.

[124] *See, e.g.*, Michigan PSC at 3 ("Title I . . . does not specifically contain a duty to provide unbundled access to network elements, as does Title II").

used" – not merely "usable" – "in the provision of a telecommunications service," which means that the *incumbent* must use the network element in this way.[125]

Moreover, the very same facilities-based competition that supports classifying broadband under Title I also supports ending the unbundling of broadband facilities under the "impairment" standard of Section 251(d)(2). The Title I route is simpler and more elegant, but the competitive situation compels the same deregulatory result under Title II.

C. *Computer II/III* Rules Should Be Eliminated for Broadband

No matter what the Commission decides about the various statutory questions at issue in this proceeding, the Commission should refrain from imposing any of the *Computer II/III* ONA and CEI requirements on broadband – including any obligation to unbundle and offer under tariff the telecommunications component of information services.[126] It may be that, once upon a time, the only way for information service providers to reach their customers was over the local telephone network using traditional dial-up service, and the *Computer II/III* regime was designed to ensure that they did not abuse their control over this presumed "bottleneck" to the customer.[127]

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[125] 47 U.S.C. § 153(29).

[126] Other ONA/CEI requirements include the obligation to track and report on installation, maintenance, and repair intervals; to provide comparable end-user access to signaling and derived channels; to impute tariffed rates for short cross-connections; and to comply with various unnecessary accounting requirements. The Commission has previously recognized that unnecessary "filing and reporting requirements … impose[] administrative costs upon carriers" that can "lead to increased rates for consumers" and have "adverse effects on competition." Second Report and Order, *Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services,* 9 FCC Rcd 1411, 1479, ¶ 177 (1984).

[127] Further Notice of Proposed Rulemaking, *Computer III Further Remand Proceedings,* 13 FCC Rcd 6040, 6067-68, ¶ 43 (1998) (stating that Commission adopted *Computer II/III* rules to prevent the former Bell companies from using their control over "the *local exchange network*

As Verizon has indicated in previous filings, however, the *Computer II/III* rules have outlived their usefulness even in the narrowband world for which they were designed.[128] More importantly, the fundamental premise of the rules – that the local telephone network is the only way to reach information service customers – has never been true in broadband, which has been marked from the beginning by the deployment of competing modes for bridging the last mile to the customer and competing packet-switched network facilities.

Moreover, it would make no sense to classify broadband services (including broadband transmission) under Title I, thus giving the Commission a fresh, technologically neutral environment in which to craft a uniform regulatory scheme for broadband, and then to impose *Computer II/III* regulations on broadband that require, in effect, the creation of new, tariffed Title II services. The *Computer II/III* rules are essentially a roundabout way of imposing the same inappropriate common-carrier regime on broadband that the Commission ought to be eliminating. Certainly, it would be neither logical nor permissible for the Commission to impose *Computer II/III* regulations solely on local telephone companies in their provision of broadband.

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and the provision of basic services . . . to engage in anticompetitive behavior against ISPs that must obtain basic network services from the BOCs in order to provide their information service offerings") (emphasis added); *see also id.* at 6048, ¶ 9 ("one of the Commission's main objectives in the *Computer III* and ONA proceedings has been to . . . prevent[] the BOCs from using their local exchange market power to engage in improper cost allocation and unlawful discrimination against" providers of information services).

[128] Comments of Verizon at 3-14, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Advanced Services; 1998 Biennial Regulatory Review: Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 98-20 & 95-10 (FCC filed Apr. 16, 2001); Reply Comments of Verizon at 3-4, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Advanced Services; 1998 Biennial Regulatory Review: Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 98-20 & 95-10 (FCC filed Apr. 30, 2001).

Having decided to forbear from extending the *Computer II/III* rules to cable broadband service,[129] the Commission must be consistent and do likewise for local telephone companies.

Importantly, the very same policy reasons that justify classifying all stand-alone broadband transmission under Title I likewise justify the elimination of the *Computer II/III* regime as applied to broadband. Given the local telephone companies' lack of market power or control over any bottleneck facilities, there is no need to subject them to the *Computer II/III* regime, and doing so actually hinders investment and retards broadband deployment. The *Computer II/III* requirements impose technical and administrative costs on local telephone companies that none of their broadband competitors face, and they require that local telephone companies offer transmission services under tariff at cost-based rates. These costs and requirements skew competition against local telephone companies, who are not free to experiment with the same market-based pricing plans that their competitors use. Ultimately, inappropriate application of the *Computer II/III* rules to broadband risks harming competition and cementing the already dominant position of the cable incumbents.

Those cable companies have vociferously protested against the imposition of anything even remotely resembling the *Computer II/III* regime on their own broadband offerings. In comments recently filed with the Commission, the largest cable-company trade association said, "[t]he costs and uncertainty of accommodating multiple ISPs in a manner dictated by the government rather than the marketplace would almost certainly have significant adverse effects

[129] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825-26, ¶¶ 44-47.

on investment in and deployment" of broadband.[130] AT&T agrees and argues that a mandatory access regime would be "disastrous," because it would prevent the market from reaching "most efficient solutions" and would "impair the implementation of 'case by case' access arrangements tailored to meet the particular needs or requests of individual ISPs."[131] All this is just as true in the context of wireline broadband offered by local telephone companies, which compete head-to-head with cable.

In light of the pernicious effects of the current *Computer II/III* regulations, the Commission should ignore some commenters' calls for the addition of even more burdensome regulations under the *Computer II/III* regime, which would create even greater regulatory disincentives to investment in broadband and even greater distortion of the competition in the marketplace.[132] In particular, the Commission should certainly not re-impose the structural separation requirements eliminated in the *Computer II/III* proceedings, as some commenters suggest.[133] It has now been fifteen years since the Commission eliminated structural separation for provision by the former Bell companies of enhanced or information services and replaced it with ONA nonstructural requirements.[134] The Commission correctly determined then that "the inefficiencies and other costs to the public associated with structural separation significantly

[130] Comments of the National Cable & Telecommunications Ass'n at 24, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52 (FCC filed June 17, 2002).

[131] AT&T Cable Broadband Comments at 5.

[132] *See, e.g.*, ASCENT at 35; Vermont Pub. Serv. Bd. at 22.

[133] *See, e.g.*, AT&T at 61.

[134] *See* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986).

outweigh the corresponding benefits."[135] On each subsequent occasion the Commission re-examined the issue, it came to the same conclusion,[136] and, if anything, the costs have become greater and the benefits smaller over time.

Similarly, there is no justification for so-called "self-enforcing mechanisms" with escalating penalties, which some commenters would have the Commission impose on local telephone companies.[137] The complicated auditing mechanisms some commenters propose would be expensive and burdensome. Furthermore, as Verizon explained recently in its comments in the *National Performance Metrics Proceeding*, imposing automatic damages payments would violate both the Act and the Constitution.[138]

D. Section 272 or Other Separate Affiliate Obligations for Broadband Hinder Carriers in Offering a Competitive Alternative in the Broadband Market

Whatever merits the separate affiliate requirement for interLATA telecommunications services may have in the long-distance voice context, it serves no useful purpose in broadband and causes inefficiencies for local telephone companies that none of their competitors need

[135] *Id*. at 987, ¶ 46.

[136] *See, e.g.*, Memorandum Opinion and Order on Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3035, 3038, ¶ 25 (1987) ("[S]tructural separation imposes direct costs on … the BOCs from the duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies from the commonality of inputs, such as technology and expertise, that these firms could use to produce different services."); Report and Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7575, ¶ 8 (1991) ("[O]ur experience with structural separation shows that it inhibits BOC provision of enhanced services.").

[137] *See, e.g.*, Earthlink at 35-36; AT&T at 60-61.

[138] Comments of the Verizon Telephone Cos. at 43-47, *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318 (FCC filed Jan. 22, 2002); *see id.* at 46 n.95.

contend with. Unlike voice services, broadband capabilities and the facilities that support them cannot be readily categorized as "local" or "long distance," either in the minds of consumers or in the operation of the network.[139] Keeping the affiliates separate, with separate employees and separate financing, creates operational complexities that raise costs and ultimately create disincentives to investment. Especially pernicious is the Commission-imposed requirement that only a separate affiliate may operate, install or maintain facilities that provide interLATA services. In fact, Verizon has already incurred nearly *half a billion* dollars in incremental costs associated with the operation of a separate affiliate for broadband services.[140] Because services are relatively new and are used by only a fraction of the number of customers that use narrowband voice services, the added costs imposed by separation requirements are spread across a smaller customer base and have a correspondingly greater impact on incentives to invest.[141]

As described in the attached declaration of Michael D. Poling, the inefficiencies affect systems for provisioning and maintaining service, processes for managing the interaction among multiple affiliates, and work groups to care for customers and the network.[142] Each carrier requires systems for network creation, ordering, provisioning, surveillance, maintenance, and repair. Breaking up a single, integrated broadband service into separate services provided by separate affiliates necessarily requires duplication of each of these systems by each separate

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[139] *See* Declaration of Michael D. Poling ¶¶ 4-5 (attached hereto as Exhibit D).

[140] *See id.* ¶ 3.

[141] *See id.* ¶ 6.

[142] *See id.* ¶ 7.

affiliate.[143] This requires not only duplication of facilities, equipment, software, and the like, but also of employees performing the same functions.[144] Then, additional processes must be developed and managed to coordinate the interaction of these multiple duplicate systems and multiple duplicate employee work groups among the multiple separate affiliates.[145] The problems of coordinating among multiple affiliates and their separate systems and groups have a particularly negative effect on new technologies because any such new technology must be tested separately to ensure proper interaction with all of the multiple systems affected.[146] The extra costs involved in such integration testing may hamper the introduction of new technologies and the deployment of new services. Certainly, all the complexities and costs associated with operating separate affiliates place local telephone companies at a competitive disadvantage vis-à-vis their competitors who do not face similar complexities and costs.

In short, allowing investment on an integrated basis would promote increased deployment and increased competition. The interLATA and intraLATA aspects of broadband service are, as a practical matter, inextricably intertwined. Trying to keep them separate by regulatory fiat benefits no one and ultimately harms consumers. The removal of the separate affiliate requirement would thus be sound policy even if the Commission decided to regulate broadband transmission under Title II.

[143] *See id.* ¶ 8.

[144] *See id.* ¶ 10.

[145] *See id.* ¶ 9.

[146] *See id.* ¶ 11.

Classifying broadband under Title I would relieve local telephone companies of the need to operate separate affiliates for interLATA broadband services under Section 272. Significantly, the separate affiliate requirement for interLATA information services has already sunset.[147] The remaining separate affiliate requirement of interest here applies to interLATA "telecommunications services."[148] It follows that, if stand-alone broadband transmission is offered as Title I "telecommunications" rather than Title II "telecommunications service," then the Section 272 separate affiliate requirement does not apply. This result is entirely consistent with Commission precedent. The Commission recently emphasized that, unlike Section 271 of the Act, Section 272 explicitly refers to, and has distinct requirements for, "information services" and "telecommunications services."[149]

The result should be no different when, as has sometimes been the case, the Commission has required a separate affiliate or other unique burdens for advanced services as a condition for approval of merger transactions. The rules of general applicability adopted here should apply equally to all providers and should supplant both prior Commission rules and any company-specific requirements that were imposed before the Commission had an opportunity to determine what the rules should be for all. The merger conditions were imposed at a time when the Commission assumed that sharing of the local telephone network for broadband was useful without considering the availability of intermodal competition. But this proceeding is about

[147] *See* 47 U.S.C. § 272(f)(2).

[148] *See id.* § 272(a)(2)(B).

[149] Order on Remand, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 FCC Rcd 9751, 9762-64, ¶¶ 22-24 (2001).

establishing a broadband policy that recognizes actual market conditions. Once the Commission has recognized that "the one-wire world for customer access appears to no longer be the norm in broadband services markets as the result of the development of intermodal competition among multiple platforms,"[150] there is no sound basis for imposing costly requirements on local telephone companies when none of their competitors are saddled with any even remotely comparable restrictions. Regardless of whether requirements imposed on local telephone company broadband are embodied in a merger condition, their effect is to cement the leading position of the cable companies in mass-market broadband, to slow broadband deployment, and ultimately to harm consumers. They should be eliminated.

E. Preemption of State Regulation is Required for a National Policy To Encourage Broadband Investment

Whatever classification the Commission ultimately chooses for broadband, it should preempt state and local attempts to regulate broadband services.[151] Otherwise, broadband providers will be subject to a patchwork of regulations that would make expanding services more difficult, thus impeding the development of broadband services and undermining the Commission's efforts to create a minimal regulatory environment for broadband. The Commission should preempt states from regulating broadband services indirectly as well as directly. In particular, the Commission should preempt any state efforts to regulate broadband by imputing revenues from broadband to other regulated services (effectively denying or severely limiting broadband providers from profiting from their risky investments in new

[150] Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001).

[151] Verizon at 36-39; SBC at 32-37; Alcatel at 6; BellSouth at 24-26; Catena at 8-9.

broadband services or facilities), or allocating costs from regulated services to broadband services (effectively driving up the price of broadband to the detriment of consumers and of competition). Indirect regulation through artificially imputing revenues from and allocating costs to broadband would depress incentives for investment, deployment, and innovation in broadband, in contravention of federal policy.

As discussed in Verizon's opening comments, the Commission has ample authority to preempt any state and local attempts at regulating broadband. Preemption of state regulation is permissible when a matter is entirely interstate, or when the intrastate aspects are inextricably intertwined with the interstate aspects so that state regulation would negate the Commission's exercise of its own lawful authority.[152] The Commission's jurisdiction over "all interstate and foreign communication by wire and radio"[153] is defined to include "the instrumentalities, facilities, apparatus, and services . . . incidental to such [communication]."[154] Thus, the Commission may lawfully preempt state regulation not only of mixed-use services themselves, but also of the facilities and ancillary services associated with them, so long as their intrastate and interstate aspects are sufficiently intertwined. The D.C. Circuit has suggested, for example,

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[152] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may preempt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation, and (2) the state regulation would negate the Commission's lawful authority over interstate communication); *Public Serv. Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (preemption allowed to protect a "valid federal regulatory objective"); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (upholding FCC preemption of purely intrastate state regulations where, although compliance with federal and state regulations is technically possible, it is unlikely for operational and economic reasons).

[153] 47 U.S.C. § 152(a).

[154] *Id.* § 153(a).

that that FCC has authority to preemptively regulate the marketing even of purely intrastate services that are sold in a package with interstate services, if "marketing realities" create the requisite inseparability.[155] As discussed below, the interstate and intrastate aspects of broadband are as a practical matter inseparable.

The *Cable Modem Declaratory Ruling* classified cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries."[156] This is also true of broadband services provided by telephone companies. More fundamentally, however, data services should be presumptively regarded as interstate in nature, because it is simply not practical to distinguish between interstate and intrastate data communications, or to subject isolated data flows to different regulatory regimes. These services thus present a classic example of when compliance with both state and federal regulation, even if technically possible, is unlikely due to operational and economic considerations. The Ninth Circuit upheld the Commission's preemption of intrastate regulations of mixed-use services in similar circumstances in *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994). Because broadband is predominantly interstate, and because separately regulating the interstate and intrastate components of broadband (if it is even possible) would undermine the Commission's efforts to remove regulatory disincentives to broadband investment, preemption is appropriate.

[155] *See Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 n.7 (D.C. Cir. 1989).

[156] *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, ¶ 59.

It is worth noting in this context that classification of broadband under Title I should have no impact on the cost allocations in the dual state-federal ratemaking framework.[157] The Commission has adopted a freeze of separation factors to stabilize the process and "reduce regulatory burdens on carriers during the transition . . . to a deregulated, competitive environment in the local telecommunications marketplace."[158] There is no reason that the Commission could not continue to rely on those stabilized factors by treating broadband services – for accounting purposes only – as a regulated service. Consistent with the policy of the freeze, this would avoid disruptive changes in current allocations.[159]

Even at the inception of its cost rules for deregulated services, the Commission recognized that some Title I services were appropriately treated as regulated for cost accounting purposes. In the original *Part 64 Order*, even though billing and collection services had been removed from Title II regulation and were not being treated as common-carrier services, the Commission elected to continue to treat billing and collection services as regulated for accounting purposes.[160] As with billing and collection services, there is no basis to expect that including broadband services in the separations process will result in a misallocation of costs

[157] *See NPRM*, 17 FCC Rcd at 3048, ¶ 63.

[158] Report and Order, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 FCC Rcd 11382, 11390, ¶ 13 (2001).

[159] While Verizon has previously recognized that Title I classification of broadband services *could* make them eligible for treatment as non-regulated services under Part 64, the policy concerns described above suggest that the better option would be to leave their treatment under Part 64 unchanged.

[160] *See* Report and Order, *Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities*, 2 FCC Rcd 1248, 1309, ¶ 81 (1987) ("*Part 64 Order*").

between the jurisdictions.[161] Indeed, because the freeze was adopted assuming that broadband costs were part of the regulated accounting costs, there is every reason to expect that current inputs to the separations process include these costs and that the current separations process produces a reasonable apportionment of costs between state and interstate jurisdictions. Broadband costs and revenues would be assigned to the interstate jurisdiction under existing Part 36 rules.[162] In this way, the Commission would continue with reasonable jurisdictional results pending the ultimate elimination of such rules.

F. Contribution to the Schools and Libraries Portion of the Universal Service Fund by All Providers of Broadband Transmission Is Both Lawful and Equitable

Contrary to the suggestion of several commenters,[163] eliminating the *Computer II/III* rules and classifying broadband transmission under Title I would not necessarily exempt local telephone companies from universal service contributions or otherwise threaten the solvency of the universal service fund. As Verizon explained in its opening comments,[164] although Title I services are not subject to mandatory universal service contributions, the Commission could require broadband-based contributions to the fund under its permissive authority. This is

[161] Just as was done for billing and collection costs, broadband interstate costs can be removed from access elements under Part 69. The Part 69 process occurs after the Part 36 separations process has been completed.

[162] *See generally* 47 C.F.R. §§ 36.1 *et seq*.

[163] WorldCom at 83-85; Big Planet at 56-58; National Telecommunications Cooperative Ass'n at 7-9; National Rural Telecom Ass'n at 9, 13-16; *see generally, e.g.*, NCTA.

[164] Verizon at 43-45.

because "[a]ny other provider of interstate *telecommunications* may be required to contribute . . . if the public interest so requires."[165]

Because the schools and libraries fund is the only portion of the universal service fund used to subsidize the purchase of broadband services,[166] the Commission should require all providers of broadband transmission (regardless of the technology they use) to contribute to the schools and libraries fund, but only that fund.

Conclusion

Whatever regulations the Commission imposes on local telephone companies in their provision of broadband must apply equally to their broadband competitors. In view of the Commission's recent decision to regulate cable modem service under Title I of the Communications Act (and not to require that the cable broadband transmission be offered on a common-carrier basis), the Commission should classify all broadband services – including stand-alone transmission services – under Title I, regardless of the heritage of the company that provides them.

[165] 47 U.S.C. § 254(d) (emphasis added).

[166] *See id.* § 254(c)(3) ("[I]n addition to the services included in the definition of universal service," the Commission "may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section."); 47 C.F.R. § 54.503.

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Respectfully submitted,

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